

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-7096

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

PHILLIP DOUGLAS MILLER, ESQ.

Plaintiff,

vs.

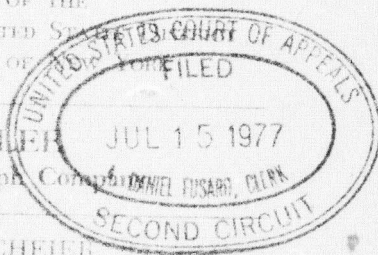
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
et al.,

Defendants.

ON APPEAL FROM AN ORDER OF THE
HON. KEVIN THOMAS DUFFY OF THE UNITED STATES
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLER

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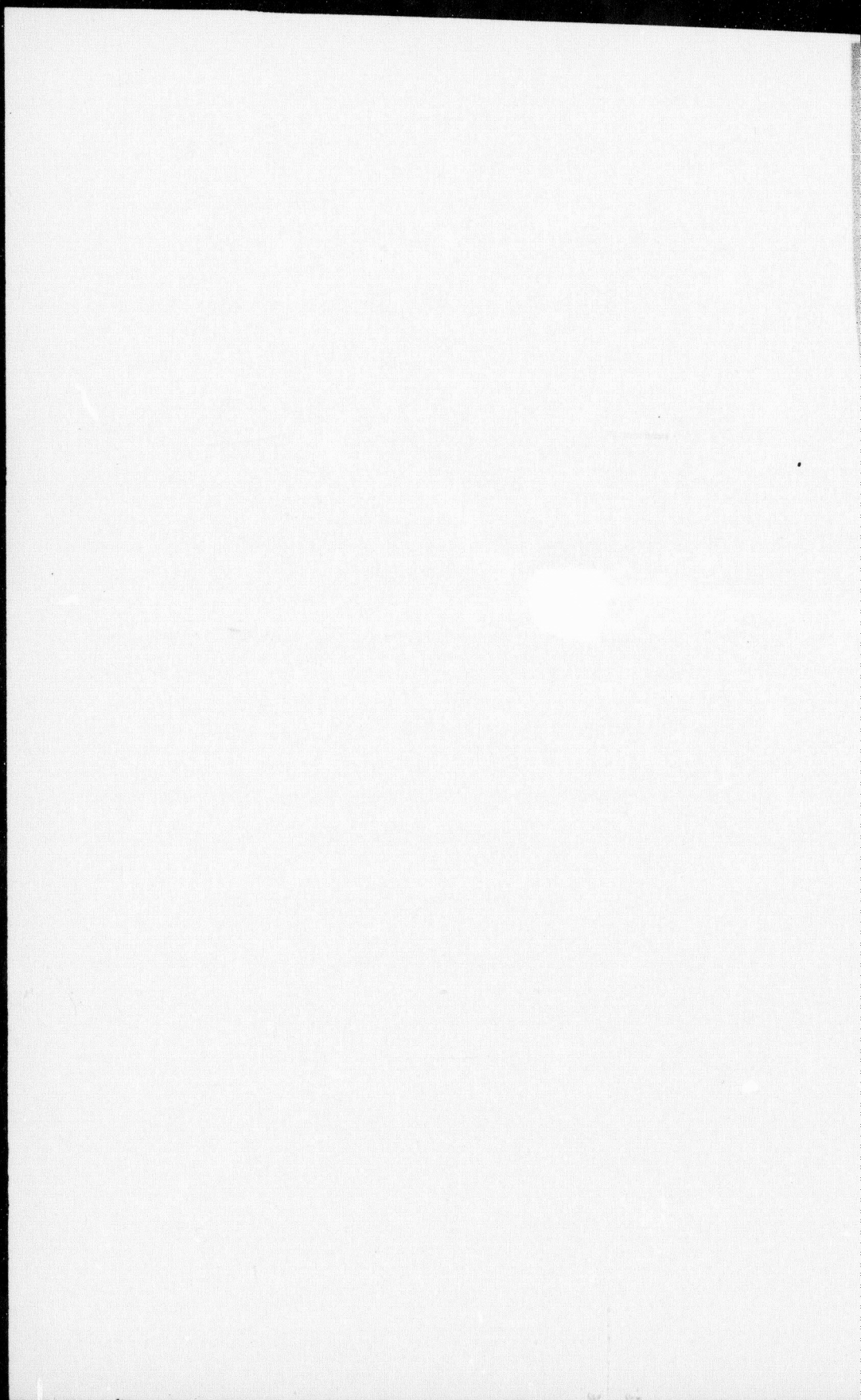


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vs.

AMERICAN TELEPHONE AND
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Defendants.

On Appeal from an Order of The
Honorable Kevin Thomas Duffy of the United States
District Court for the Southern District of New York

BRIEF OF APPELLEE
American Telephone and Telegraph Company

STATEMENT OF ISSUES

The plaintiff, asserting legal errors on the part of the district court judge, raises eleven issues for review. Defendant believes it is necessary for clarity to consolidate some of the issues and to restate and delineate the precise errors alleged and the resulting questions raised by this appeal. The order in which defendant presents the issues reflects the order in which they were dealt with by the district court.

The issues presented are:

- I. Whether the district court's denial of plaintiff's application for a preliminary injunction was an abuse of the district court's discretion.
- II. Whether plaintiff effectuated such proper service upon the individual defendants as to bring them within the district court's jurisdiction.
- III. Whether the dismissal of certain of plaintiff's alleged causes of action was proper and more specifically:
 - A. Whether plaintiff alleged the governmental or state action required in order to find that defendant violated his First, Fifth, and Fourteenth Amendment rights.
 - B. Whether plaintiff alleged facts sufficient to support a claim of involuntary servitude under the Thirteenth Amendment.
 - C. Whether plaintiff has alleged facts sufficient to support a claim under 42 U.S.C. §1982.¹
 - D. Whether plaintiff's claim posited upon Executive Order No. 11,246 and 41 C.F.R. 31.12.803-1 is actionable.
 - E. Whether plaintiff alleged a conspiracy legally sufficient to support a 42 U.S.C. § 1985(3) claim.
 - F. Whether plaintiff is required to exhaust his administrative remedies as a prerequisite to maintaining a 42 U.S.C. § 2000e suit.
 - G. Whether the dismissal of plaintiff's claims under New York Executive Law §§ 292.1, 296.1, and 297.9 was a proper exercise of the district court's discretion.

1. Plaintiff raises this question in his statement of issues only, but does not argue the point in his brief.

STATEMENT OF THE CASE

A. *Procedural History:*

Plaintiff filed this suit naming the American Telephone and Telegraph Company (hereinafter sometimes referred to as "AT&T" or "the Company") and certain named and unnamed AT&T employees as defendants. In his complaint, plaintiff alleged, *inter alia*, numerous constitutional, statutory, and common law causes of action involving charges of racial discrimination or other misconduct in connection with: 1) his hiring; 2) the terms and conditions of his employment; 3) his classification and status during his employment; 4) retaliation for voicing his complaints; and 5) his discharge. The relief requested was monetary damages and reinstatement or, alternatively, a contract of retainer for legal services.

Defendant AT&T moved to dismiss the action pursuant to *Rule* 12(b)(6), Fed. R. Civ. P. for failure to state a claim upon which relief could be granted and, alternatively, to dismiss the action against the individual defendants pursuant to *Rule* 12(b)(2) for lack of jurisdiction of their persons, and to strike Paragraphs (f) through (o) of the complaint, pursuant to *Rule* 12(f) Fed. R. Civ. P. on the grounds that the allegations contained therein were immaterial and irrelevant. Plaintiff responded by moving for a preliminary injunction directing AT&T to show cause why it should not immediately reinstate plaintiff or, in the alternative, execute a contract of retainer for legal services with him.

In a Memorandum and Order, dated February 3, 1977, The Honorable Kevin Thomas Duffy, Judge of the United States District Court for the Southern District of New York, ruled upon both applications. The

Order denied plaintiff's motion for a preliminary injunction, granted defendant's motion to dismiss the complaint as to the individual defendants, and further granted defendant's motion to dismiss the complaint except for plaintiff's claim based on 42 U.S.C. § 1981 and common law claims related thereto. The surviving claim under § 1981 and related common law claims preserve plaintiff's right to pursue his allegations of racial discrimination against the defendant. Defendant's application for the striking of portions of the complaint was denied except as to those claims which were dismissed. Plaintiff appealed the bulk of the adverse rulings contained in the Order.

B. Statement of Facts:

The "facts" before this Court are those allegations and charges contained in plaintiff's pleadings. The gist of those allegations follows. Plaintiff charges that he was offered a job as a tax attorney with responsibilities in the area of investment credit, depreciation and cost accounting and further that he was being groomed to assume the position of Manager, Tax and Research Planning in two or three years. His position allegedly entitled him to certain salary increments and benefits. He claims, however, that, he was required to perform the duties of an accountant; he was given no responsibilities in the allegedly promised areas; that the Manager's position would probably not be vacant for 5½ years; and he did not receive an allegedly promised raise and other benefits. Plaintiff asserts that AT&T's primary motivation for hiring him was the satisfaction of its "minority quota".

Plaintiff's claim continues with the assertion that once hired, he was discriminated against during the

period of his employment in that he was assigned useless and unnecessary work and that after complaining of its allegedly discriminatory conduct, the Company retaliated against him by assigning him a meaningless task and criticizing him for his attitude. He asserts further that his supervisors, rather than take affirmative action to rectify the situation, suggested that he transfer to the legal department, accept another position within the Comptroller's Department or voluntarily resign from the Company. Plaintiff asserts that he rejected these options as he believed the Company had an obligation to mend the error of its ways. He continued his complaints of discrimination and asserts he indicated that if AT&T did not respond to him in a way he considered fair he would institute legal proceedings.

Approximately two months later he was dismissed because of his poor attitude and job performance. Plaintiff alleges that his performance record was good and that his discharge constituted the denouement in a scenario of discrimination.

ARGUMENT

I. The district court's denial of plaintiff's application for a preliminary injunction was not an abuse of the court's discretion.

Plaintiff applied to the district court for a preliminary injunction ordering his reinstatement or, in the alternative, ordering the Company to enter into a contract for legal services with him. The court denied the plaintiff's application. The reason given for the court's denial was that the injunction would not preserve the status quo but rather, would grant plaintiff substantially the ultimate relief he requested despite the fact that plaintiff's allegations did not evidence a clear right to such relief. Furthermore, the district court reasoned that plaintiff's delay in seeking the injunction undercut his claimed need for immediate relief.

The district court's denial of plaintiff's application was reasonably made in accordance with the law governing preliminary injunctions. The purpose of a preliminary injunction is the preservation of the status quo pending the judicial resolution of the controversy. *SCM Corp. v. Xerox Corp.*, 507 F.2d 358, 361 (2d Cir. 1974); *Unicon Management Corp. v. Koppers Co.*, 366 F.2d 199 (2d Cir. 1966). In this case the basis for the extraordinary form of relief known as preliminary injunction does not exist in that there was no employment relationship between plaintiff and the Company at the time this suit was instituted. Therefore, it was reasonable for the district court to deny such relief. Indeed, in such situations, courts have not hesitated to do so, and on appeal the exercise of such discretion has not been found to be abusive. *SCM Corp.*, *supra*.

In addition to demonstrating an appropriate reason for issuance of a preliminary injunction the plaintiff must make a three-fold showing: 1) possibility of success upon the merits, 2) irreparable harm if the relief is not granted, and 3) upon a balancing of interests, that the hardship to plaintiff far outweighs the harm to the defendant. The courts have consistently held that the above three requirements are the *sine qua non* of any injunctive relief. *Hudson Tire Mart, Inc. v. Aetna Casualty & Surety Co.*, 518 F.2d 671 (2d Cir. 1975); *414 Theater Corp. v. Murphy*, 499 F.2d 1155 (2d Cir. 1974).

Where a plaintiff does not meet all three criteria, courts have denied injunctive relief. *Hudson Tire Mart, supra*. Plaintiff asserts that he will suffer irreparable harm as the result of his dismissal from AT&T. The Supreme Court, however, has ruled that the loss of income does not constitute irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 94 S.Ct 937 (1974). In denying a plaintiff's application for an injunction restraining the termination of her employment, Mr. Justice Rehnquist stated:

Assuming for the purpose of discussion that respondent had made a satisfactory showing of loss of income and had supported the claim that her reputation would be damaged as a result of the challenged agency action, *we think the showing falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction in this type of case.* (emphasis added) 415 U.S. at 91-92, 94 S. Ct. at 953.

Further, since the plaintiff herein is seeking substantially all of the relief to which he would be ultimately entitled if he succeeded in a trial on the merits, plaintiff must show that his right to the relief is clear,

reasonable and well defined. *Hambros Bank, Ltd. v. Meserole*, 287 F. Supp. 69 (S.D.N.Y. 1968); *Blaich v. National Football League*, 212 F.Supp. 319 (S.D.N.Y. 1962). Plaintiff's conclusory allegations do not provide a clear or well defined basis upon which to grant the requested relief. Thus, a reasonable man could conclude that the plaintiff's complaint presents no clear possibility of ultimate success on the merits. Furthermore, an application for injunctive relief is equitable in nature. The equity powers of a court should not be invoked where the law provides an adequate remedy. *Jerome v. Viviano Food Co.*, 489 F.2d 965 (6th Cir. 1974); *SCM Corp.*, *supra*. In the case at bar, monetary damages would constitute adequate relief should plaintiff prevail and therefore no justification exists for granting the extraordinary remedy of an injunction. *SCM Corp.*, *supra*.

As the granting or denying of an application for a preliminary injunction is within the court's discretion, the court's ruling on such a motion may only be reversed if it is found to constitute a clear abuse of discretion. *Unicon Management Corp. v. Koppers Co.*, 366 F.2d 199 (2d Cir. 1966); *Hudson Tire Mart, Inc. v. Aetna Casualty & Suerty Co.*, 518 F.2d 671 (2d Cir. 1975). An abuse of discretion occurs only:

... when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Delno v. Market St. Ry. Co.*, 124 F.2d 965, 967 (9th Cir. 1942).

The district court applied plaintiff's allegations and assertions to the elements and criteria which must be

shown in order to grant a preliminary injunction. The court in its discretion reasonably determined plaintiff's assertions did not satisfy essential criteria for a preliminary injunction. Judge Duffy acted within his discretion and in accordance with established legal principles when he denied plaintiff's application for a preliminary injunction. Since the district court's ruling was reasonable and thus, by definition, could not constitute an abuse of discretion, such ruling should be sustained.

II. Plaintiff did not effectuate such proper service upon the individual defendants as to bring them within the district court's jurisdiction.

In the case at bar, plaintiff has named various individuals, as well as AT&T, as parties defendant. In attempting to obtain service of process upon these individuals, plaintiff has failed to satisfy the rules and statutory requirements for proper service. Plaintiff did not attempt ordinary means of service; rather, he immediately sought and obtained an order of the court, authorizing the extraordinary procedure of "last resort" service under N.Y. CPLR § 308(5).² This method purported to unilaterally appoint the corporate defendant, AT&T, as the agent authorized to receive service of process for the individual defendants without the knowledge or consent of these individuals. Pursuant to this procedure, copies of the summons and complaint were served upon the corporate defendant, which was to deliver

2. N.Y. CPLR § 308(5) provides that:
Personal service upon a natural person shall be made by any of the following methods:

• • •
5. in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.

them to each individual defendant. The district court, however, granted defendants' motion to dismiss the complaint against the individual defendants, reasoning that as none of the individual defendants had appointed AT&T their agent for this purpose, such service of process was defective and consequently, the court lacked *in personam* jurisdiction over the individual defendants.

Fed. R. Civ. P. 4(d)(7) allows service to be perfected in accordance with the rules of the state in which the district court is located. *Grammenos v. Lemos*, 457 F.2d 1067 (2d Cir. 1972). In the case at bar, as neither the federal nor state rules have been complied with, service is defective. A plaintiff may not obtain service under N.Y. CPLR 308(5) until he has met a "heavy burden" by showing that an "exhaustive search" for the defendants sought to be served has been made to no avail, and that all other methods of service are impractical. *Deason v. Deason*, 343 N.Y.S. 2d 276, 280 (1973); *Zeek v. Zeek*, 346 N.Y.S. 2d 117, 119 (1973). Plaintiff herein made *no* effort to serve the individual defendants by ordinary means; rather, his first resort was to the extraordinary method of service of process provided by N.Y. CPLR 308(5), which is meant to be a "last resort". As such, plaintiff's attempted service upon the individual defendants is defective and the district court has no personal jurisdiction over these individuals. *Royal Lace Paper Works, Inc. v. Pest-Guard Products, Inc.*, 240 F.2d 814 (5th Cir. 1957).

In addition to not complying with above referenced state rule, plaintiff has not complied with the Federal Rules governing service of process. Fed. R. Civ. P. 4(d)(1) provides that process is to be served upon the person of the defendant or an agent "... authorized by appointment or by law ..." to receive it. The former

phrase applies only to the situation where an agent is actually appointed to receive process. *Sappia v. Lauro Lines*, 130 F. Supp. 810 (S.D.N.Y. 1955); 2 *Moore's Federal Practice*, § 4.12, (2d ed. 1948). AT&T was not appointed agent for this purpose by the individual defendants, nor does any other law, including N.Y. CPLR 308(5), apply so as to make AT&T constructive agent for service of process. See *Moore, supra*. Therefore, the manner in which process has been served does not satisfy the requirements of either federal or state rules, and accordingly the district court never obtained jurisdiction over the individual defendants.

III. The dismissal of certain of plaintiff's alleged causes of action was proper.

III A. Plaintiff failed to allege the governmental or state action required in order to find that defendant violated his First, Fifth and Fourteenth Amendment rights.

Plaintiff has appealed the district court's dismissal of his causes of action which assert that AT&T deprived him of his rights under the First, Fifth and Fourteenth Amendments.³ The rationale supporting the dismissal was the absence of state action. The First, Fifth and Fourteenth Amendments do not extend their protections to private actions. The First and Fifth Amendments operate as a proscription against action by the federal government and the Fourteenth Amendment, including those provisions of the first ten amendments incorporated therein, functions

3. In his complaint, plaintiff also alleged a violation of his rights under the Ninth and Tenth Amendments. The district court dismissed all of plaintiff's constitutional claims and plaintiff has withdrawn his appeal of the dismissal of his Ninth and Tenth Amendment claims.

only as a bar to state actions. *Bloom v. Illinois*, 391 U.S. 194, 88 S. Ct. 1477 (1968); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964); *Burton v. Wilmington Parking Authority*, 365 U.S. 706, 81 S. Ct. 856 (1961); *Public Utilities Commission v. Pollak*, 343 U.S. 451, 72 S. Ct. 813 (1952); *Gitlow v. People of New York*, 268 U.S. 652, 45 S. Ct. 625 (1925). Thus, contrary to plaintiff's contention, the fundamental threshold consideration is whether or not the federal or any state government participated in the alleged violation of plaintiff's rights subsumed under these amendments.⁴

Since governmental (state or federal) action is required for a violation of any of these amendments, it is necessary to consider those activities by federal or state governments which plaintiff asserts would satisfy this requirement with respect to his claims under these amendments. It is apparently plaintiff's contention that the 1973 Consent Decree between the United States Government and AT&T, which establishes the Company's affirmative action program, would satisfy the governmental action requirement with

4. The cases relied upon by plaintiff to support his contention that state action is not a requisite for claims posited on the First, Fifth and Fourteenth Amendments are inapposite. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S. Ct. 2186 (1968), plaintiffs' action sought relief from defendants' refusal to sell a home to plaintiffs solely because of their race. The claim was based on 42 U.S.C. § 1982, and the Court ruled that the statute which was enacted by Congress pursuant to the enabling provision of the Thirteenth Amendment, did encompass private acts which fall within its prohibitions. *Runyon v. McCrary*, 427 U.S. 160, 96 S. Ct. 2586 (1976), also dealt with a statute posited on the Thirteenth Amendment. In that case, parents of children denied admission to private schools solely because of their race brought an action against the schools under 42 U.S.C. § 1981. Both cited cases are concerned with the statutes enacted pursuant to the legislative power granted Congress under the Thirteenth Amendment, and as such neither addressed nor in any sense bears upon the issue of the requisite state action which must be asserted in order to establish a cause of action arising from an alleged violation of individual freedoms protected under the Bill of Rights and the Fourteenth Amendment. The discussion of Mr. Justice White, dissenting in *Runyon*, *supra*, substantiates this difference. The basis for the dissent is the assertion that while the Thirteenth Amendment may not require state action, § 1982 is derived from the Fourteenth Amendment and thus only reaches state actions.

respect to not only federal governmental action under plaintiff's First and Fifth Amendment claims but also state action under his Fourteenth Amendment claim. At the outset, it is important to note that the Consent Decree involves only the federal government and thus the only governmental action asserted by plaintiff is that of the federal government. Such action does not and cannot satisfy the requisites of the Fourteenth Amendment which operates only upon actions by the several states and not upon actions by the federal government. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856 (1961); *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836 (1948). As a result of the absence of alleged activity by any of the several states, plaintiff has manifestly failed to state a claim which is actionable under the Fourteenth Amendment.

As plaintiff has failed to state a Fourteenth Amendment claim, the issue then is whether the participation by the federal government in the 1973 Consent Decree constitutes sufficient governmental action to sustain plaintiff's causes of action based upon AT&T's alleged violation of the First and Fifth Amendments. The Consent Decree obligates AT&T to satisfy certain targets for the hiring, transfer and other movement of the group protected thereby, consisting of women and minorities. The Consent Decree does not apply to the broad penumbra of terms and conditions of employment, but rather is limited by its provisions to hiring and movement. Plaintiff, in his complaint, does not allege any discrimination with respect to his hiring or movement, but rather alleges certain misrepresentations made to him concerning his hiring and promotional opportunities and discrimination concerning other terms and conditions of his employment such as job responsibilities, office space and accoutrements, and personal

employment environment. Accordingly, plaintiff fails to allege any facts which fall within or are subsumed under those matters with which the Consent Decree is concerned. Therefore the Consent Decree is irrelevant to plaintiff's First and Fifth Amendment claims.

Plaintiff has failed to allege or even allude to any governmental action sufficient to support a First or Fifth Amendment claim. While no precise formula exists to determine whether or not the requisite governmental action exists, the United States Supreme Court in three key cases, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856 (1961); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965 (1972); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449 (1974), has established the applicable guidelines. These standards, despite the literal meaning of the term "state action," are applicable in the same manner regardless of whether the alleged action is that of the federal government or one of the several states under the Fourteenth Amendment. *Geneva Towers Tenants Org. v. Federated Mortgage Inv.*, 504 F.2d 483 (9th Cir. 1974). Thus, even though the cases speak of state action under the Fourteenth Amendment, the principles are equally applicable to federal action under any of the first ten amendments and therefore the terms "state action" and "governmental action" are used interchangeably herein.

In *Burton*, *supra*, the Court found that the leasing of state property to a private restaurant by a governmental authority with the attendant mutual benefits (financial and other) conferred thereby constituted state action. The key element which underpinned the Court's ruling was the State Authority's economic interdependence with its private lessee. That interdependence arose from the lease which specified affirmative duties, responsibilities and ob-

ligations on the part of both parties (state and private lessee) and which further could have, but did not, contain, a provision requiring the lessee to offer its restaurant services to the public on a nondiscriminatory basis, and from the fact that the lessee's profits not only contributed to, but also were "indispensable elements in, the financial success of a governmental agency." 365 U.S. at 724, 81 S.Ct. at 861. Mr. Justice Clark writing for the Court said:

By its inaction, the Authority [the lessor], and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle [the lessee] that *it must be recognized as a joint participant in the challenged activity*, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment. (emphasis added) 365 U.S. at 725, 81 S. Ct. at 862.

Thus the Court ruled that the State Authority's participation in the private venture constituted state action.

This "participation" theory was reiterated and expounded upon by the Court in *Moose Lodge, supra*. In that case, plaintiff sued after being denied service in the bar and dining room of defendant, Moose Lodge, a private club. Plaintiff claimed that because the state issued the club a liquor license and regulated its sale, the requisite state action was present. The Court, however, disagreed. In its review of the aspects of the state action concept, the Court reasserted the following propositions: 1) that the impetus for the forbidden discrimination need not originate with the state since state action is present if the state enforces discrimination which originates privately, and 2) that, if the discrimination is private, "the State

must have 'significantly involved itself with invidious discriminations,' in order for the discriminatory action to fall within the ambit of the constitutional prohibition." (citations omitted) 407 U.S. at 173, 92 S.Ct. at 1971. In other words, the state must have been a partner in the discrimination. The Court found that neither of these criteria were satisfied as there was no suggestion that the state's regulation of the sale of liquor was intended either overtly or covertly to encourage discrimination. The Court specifically stated that the regulation of the sale of alcoholic beverages by the state *neither fostered nor encouraged racial discrimination* and thus did not constitute state action sufficient to bring the private party's conduct within the prohibitions of the Fourteenth Amendment.

In *Jackson, supra*, the Court was faced with the direct issue of whether extensive and detailed regulation of an industry converted that industry's actions into state action. The plaintiff in *Jackson* brought suit against defendant electric company for its termination of her electric service. The Court found that neither extensive and detailed regulation of an industry nor status as a monopoly were in and of themselves sufficient to establish state action. *But c.f. Bronson v. Consolidated Edison Co.*, 350 F. Supp. 443 (S.D.N.Y. 1972); *Center for United Labor Action v. The Consolidated Edison Co.*, 376 F. Supp. 699 (S.D.N.Y. 1974). Rather the test advanced by the Court was whether there is affirmative governmental action in that particular, specifically challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself. 419 U.S. at 351, 95 S.Ct. at 453. The Court ruled that no such action was present for, even though the state regulated the utility and had approved the utility's tariff, which included provisions for the termination of service, the state did not lend its authority to such practice

by affirmatively mandating its inclusion and enforcement. Such passive conduct on the part of the state, the Court reasoned, could not be said in any way to *foster or encourage discrimination*.

Plaintiff has failed to allege any governmental conduct which either fosters or encourages or affirmatively bears upon the alleged discrimination. Therefore, no governmental action has been asserted which is sufficient to state a claim under the First or Fifth Amendments.

III B. Plaintiff did not allege facts sufficient to support a claim of involuntary servitude under the Thirteenth Amendment.

Plaintiff urges this Court to reverse the district court's order granting AT&T's motion to dismiss his cause of action premised on the Thirteenth Amendment's prohibition against involuntary servitude. The district court dismissed this cause of action on the grounds that plaintiff failed to allege facts constituting involuntary servitude.

The conclusory argument presented in support of plaintiff's position is novel. Plaintiff contends that the facts which he alleged to support his claim of racial discrimination under 42 U.S.C. § 1981 are sufficient to maintain a cause of action under the Thirteenth Amendment's bar against involuntary servitude. He reasons that since the Thirteenth Amendment⁵ is the constitutional underpinning for the Civil Rights Acts, including specifically 42 U.S.C. § 1981, the acts prohibited by § 1981 delimit the boundaries

5. The Thirteenth Amendment provides:

Section 1: Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2: Congress shall have power to enforce this article by appropriate legislation. U.S. Const. Amend. XIII, §§ 1, 2.

of "involuntary servitude". Thus, he concludes that, as he has alleged facts of racial discrimination which the district court held were sufficient to state a claim for an alleged violation of § 1981, the same assertions, of necessity, are sufficient to state an independent claim for an alleged violation of the Thirteenth Amendment's prohibition against involuntary servitude.⁶ Plaintiff contends that these facts of racial discrimination are the functional equivalent of those facts which must be asserted in order to state a cause of action for involuntary servitude. While in some instance allegations of one claim may support a claim for the other, this can only be true if the requisite elements for each alleged violation are asserted. Thus, the issue is whether plaintiff has pleaded facts sufficient to satisfy the elements of a Thirteenth Amendment involuntary servitude claim.

The Court defined involuntary servitude in *United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964), as that "... action by the master causing the servant to have, or to believe he has, no way to avoid continued service or confinement" 333 F.2d at 486. Thus, the term has been functionally defined to describe a status or condition of compulsory service. *Clyatt v. United States*, 197 U.S. 207, 215, 25 S.Ct. 429, 430 (1905). This prohibition extends not only to practices in existence at the time of the enactment of the Amendment such as serfage, vassalage, villenage and peonage, but also to any condition, however characterized, whereby one person is forced to serve or labor against his will for the benefit of another. *Ex parte Drayton*, 153 F. 986, 990 (1907). The key, then, to any claim of involun-

6. Plaintiff cites no authority which supports his assertion. Indeed, his theory not only ignores the plain meaning of the term involuntary servitude but also conflicts with a consistent line of federal cases which define and delimit the concept in terms of compulsion which bears no direct correlation to racial discrimination. See discussion *infra*.

tary servitude is an assertion of compulsion. The courts have treated the existence of compulsion as a prerequisite for any claim alleging involuntary servitude prohibited by the Thirteenth Amendment. *Flood v. Kuhn*, 316 F.Supp. 271 (S.D.N.Y. 1970), *aff'd* 443 F.2d 264 (2d Cir. 1971), *aff'd* 407 U.S. 258, 92 S.Ct. 2099 (1972); *Clark v. Universal Builders, Inc.*, 409 F.Supp. 1274 (N.D. Ill. 1976); *Oliver v. Donovan*, 293 F.Supp. 958 (E.D.N.Y. 1968).

In addition to establishing compulsion as the requisite element of involuntary servitude, courts have deemed considerations of race to be irrelevant and thus plaintiff's allegations of racial discrimination do not bear on the issue of the existence of involuntary servitude. In one of its early encounters with the Thirteenth Amendment, the Supreme Court noted that "[t]he thirteenth amendment, has respect, not to distinction of race, or class, or color, but to slavery." *The Civil Rights Cases*, 109 U.S. 3, 24, 3 S.Ct. 18, 30-31 (1883).⁷

In the case *sub judice*, plaintiff has failed to allege that he was compelled to labor at or serve AT&T or that any sanctions were threatened to be applied to him should he leave its employ. He has merely alleged facts giving rise to the claim of racial discrimination. These facts are not only irrelevant but also are insufficient to sustain this claim as there is no assertion of compulsion. In the absence of such an assertion, a claim based on the Thirteenth Amendment's prohibition against involuntary servitude cannot be sustained.

7. This color blind approach has been followed in Congressional legislation which provides penal sanctions for holding an individual in involuntary servitude, without reference to race. 18 U.S.C. § 1584, *see also*, 42 U.S.C. § 1994.

III C. Plaintiff has failed to allege facts sufficient to support a claim under 42 U.S.C. § 1982.

Plaintiff, in the statement of issues in his appellate brief, asserts that the district court's dismissal of his action based on an alleged violation of 42 U.S.C. § 1982 was erroneous since such statute protects the rights of United States citizens to hold property. Further plaintiff asserts that he alleged in his complaint discriminatory interference with the personal properties of his job, reputation and profession. (Appellant's Brief p. 6-7).

Section 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." The face of the statute and cases construing it indicate that § 1982 prohibits discriminatory interference with the right to "inherit, purchase, lease, sell, hold, and convey" some form of *tangible* real or personal property and does not apply to intangible or inchoate rights such as those inherent in a job, reputation or profession. The terms of the statute, "inherit," "purchase," "lease," "sell," and "convey" can only have reference to some form of tangible property as it is not legally possible to inherit, purchase, lease, sell or convey inchoate property or right such as a job, reputation or profession. There is no judicial authority for and there is no reason to construe the use of the term "hold," as it appears in the context of § 1982, any differently than the use of the other terms referred to above, even though it is possible to "hold" a job, for instance. The term "hold" as used in § 1982 can only be reasonably construed to have reference to some form of tangible real or personal property and not to intangible rights. See *e.g.*, *Sullivan*

v. Little Hunting Park, Inc., 396 U.S. 229, 90 S.Ct. 400 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186 (1968).

The rules of statutory construction affirm defendant's assertion above as such rules provide that statutes which have a plain meaning should be given effect according to such meaning. 2A C. Dallas Sands, *Sutherland Statutory Construction*, § 46.01 (and cases cited therein) (rev. 3rd ed. 1973). Further, each part or section of a statute should be construed in connection with every other part or section so as to produce a harmonious whole. *Sutherland, supra*, § 46.05 (and cases cited therein). The application of these two rules to the case at bar leads to the conclusion that the term "hold," as used in §1982, refers to the same classes or nature of property as do all the other terms used therein. Thus, as plaintiff is alleging a denial of an intangible property right, he has failed to state a claim upon which relief can be granted under § 1982 and the district court's dismissal of the alleged cause of action should be sustained.

III D. Plaintiff has failed to state a claim posited upon Executive Order No. 11,246 and 41 C.F.R. 31.12.803-1 which is actionable.

Plaintiff's claim based on Executive Order No. 11,246 and 41 C.F.R. 31.12.803-1 is somewhat ambiguous, but apparently he is seeking to establish his right to maintain a private cause of action against AT&T for violation of this Order. The Executive Order in question requires federal contractors and subcontractors to refrain from discriminating in their employment practices as well as imposing upon such contractors certain other affirmative action obligations. 41 C.F.R. 1-12.8 *et.*

seq. specifies the procedures for enforcing this mandate. These procedures are the exclusive source of vindicating any individual rights protected by the Order and regulations, thereunder.

It has been uniformly held that there is no private right of action against a contractor for damages or injunctive relief under the Executive Order or the enforcing regulations. *Gnotta v. United States*, 415 F.2d 1271, 1275 (8th Cir. 1969); *Jackson v. University of Pittsburgh*, 11 FEP 1233, 1236 (W.D. Pa. 1975); *Lewis v. FMC Corp.*, 11 FEP 31, 34 (N.D. Cal. 1975); *Rackin v. University of Pennsylvania*, 386 F. Supp. 992, 1008, 10 FEP 1318, 1330 (E.D. Pa. 1974); *Bradford v. People's Natural Gas Co.*, 60 F.R.D. 432, 436, 6 FEP 1336, 1338 (W.D. Pa. 1973). Rather, responsibility for enforcement of these provisions is vested in the U.S. Department of Labor. *Braden v. University of Pittsburgh*, 343 Fed. Supp. 836, 840 (W.D. Pa. 1972, *vacated* 477 Fed. 2nd 1 3rd Cir., 1973). If however, the government fails to enforce these provisions, some courts have permitted an individual to bring suit against federal officials to compel compliance with their obligations under the Order. *Lewis v. Western Airlines, Inc.*, 379 F. Supp. 684, 8 FEP 373 (N.D. Cal. 1974); *Thorn v. Richardson*, 4 FEP 299, 302 (W.D. Wash. 1971).

In the case *sub judice*, plaintiff has not named federal officials as defendants, nor is he seeking enforcement of the Executive Order. Rather, he is alleging a private cause of action for damages and injunctive relief. Given the legal precedents, the dismissal of this claim should be sustained.

III E. Plaintiff has failed to allege a conspiracy legally sufficient to support a 42 U.S.C. § 1985(3) claim.

A legally sufficient 42 U.S.C. § 1985(3) ⁸ claim must allege a conspiracy between two or more persons to deprive another of the equal protection of the law or of equal privileges and immunities under the law. *Griffin v. Breckenridge*, 403 U.S. 88, 102-103, 91 S.Ct. 1790, 1798-99 (1971); *Girard v. 94th St. and Fifth Avenue Corp.*, 530 F.2d 66, 70 (2d Cir. 1976). The plaintiff seeks to invoke this section by leveling a number of conclusory allegations of racially discriminatory conduct against the company and various employees. Although totally devoid of the requisite allegations of combination, plan and overt action in furtherance thereof, the complaint received a liberal reading by Judge Duffy who treated the claim as alleging a conspiracy between AT&T and the individual defendants. Judge Duffy, however, dismissed the claim on the grounds that allegations of racial discrimination by a corporation and its employees do not present a legally cognizable claim of conspiracy where the purported conduct represents the implementation of a single policy by a single policy-making body.

An actionable conspiracy requires both an illegal agreement between two or more persons and an overt

8. § 1985(3) provides:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

act in furtherance thereof. Although in legal contemplation a corporation is considered a person, *U.S. v. Weismann*, 219 F.2d 837 (2d Cir. 1955), in reality a corporation is an artificial entity which can function only through its agents. Therefore, the acts of corporate agents performed within the scope of their agency are considered the acts of one person, the corporation. *Nelson Radio and Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952); *Mathews v. New York Racing Ass'n Inc.*, 193 F.Supp. 293 (S.D.N.Y. 1961). The general rule is that a corporation cannot conspire with its own agents, at least when the latter are performing corporate duties, any more than an individual can conspire with himself. *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699 (2d Cir. 1972), *cert. denied*, 409 U.S. 883 (1972) *rehearing denied*, 409 U.S. 1029 (1972); *Nelson Radio and Supply Co.*, *supra*; *Keddie v. Pennsylvania State University*, 412 F.Supp. 1264, 1276 (M.D. Pa. 1976); *Rubenstein v. University of Wisconsin Board of Regents*, 422 F.Supp. 61 (E.D. Wis. 1976); *Lattimore v. Loews Theatres, Inc.*, 410 F.Supp. 1397 (M.D. N.C. 1975). Furthermore, the acts of two or more of the corporation's agents functioning in their corporate capacities cannot constitute a conspiracy *Girard v. 94 St. and Fifth Ave. Corp.*, 530 F.2d 66 (2d Cir. 1976). Where, however, corporate agents are functioning outside of the scope of their agency, *i.e.*, acting individually, their acts are not considered those of the corporation and the corporation is deemed to be capable of conspiring with its employees. Additionally, even if acting within the scope of their duties, agents may conspire with the corporation, or among themselves, when "... actuated by ... [an] independent personal stake in achieving the corporation's purported illegal objective." *Girard v. 94th St. and Fifth Ave. Corp.*, 396 F.Supp. 450, 456 (S.D.N.Y. 1975); *See Greenville Publishing Co. v. Daily Reflector Inc.*, 496 F.2d 391 (4th Cir. 1974); *Cohen v.*

Illinois Institute of Technology, 384 F.Supp. 202 (N.D. Ill. 1974), *aff'd* on rehearing 524 F.2d 818 (7 Cir. 1975), *cert. denied* 425 U.S. 943 (1976).

In the case at bar, plaintiff has failed to allege either that the individual defendants acted outside the scope of their corporate duties or that their allegedly discriminatory conduct was motivated by a personal stake in achieving AT&T's allegedly illegal objective. Rather, plaintiff grounds his argument upon a selective quotation from *Rackin v. University of Pennsylvania*, 386 F.Supp. 992 (E.D. Pa. 1974), which, according to his interpretation, establishes the proposition that where more than one act of discrimination is complained of, a conspiracy exists. This emphasis upon the number of acts in furtherance of the alleged conspiracy ignores the essential issue in this count, which is whether the acts complained of are those of two or more persons or entities and therefore constitute "a conspiracy."

The leading case which discusses the elements of a conspiracy required for a § 1985(3) claim is *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972). In that case, a white attorney charged that a corporation conspired with its agents to deprive him of his civil rights in violation of § 1985(3), by refusing to rent an office to him in one of its commercial buildings because the plaintiff's clientele was mainly blacks. Judge Stevens, after noting that the individual defendants acted within the scope of their authority, stated that the conspiracy requirement of § 1985(3) "... is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm." 459 F.2d at 196.

This proposition found a receptive consideration in *Girard v. 94th St. and Fifth Ave. Corp.*, *supra*, which

the district court relied upon in dismissing the plaintiff's § 1985(3) claim. In *Girard, supra*, the Second Circuit affirmed the dismissal of plaintiff's § 1985(3) complaint on the grounds that, although plaintiff alleged multiple acts of discrimination by various employees of the corporate defendant, the alleged conduct was that of "... one single business entity with a managerial policy implemented by ... one governing board," and that one entity could not conspire with itself. 530 F.2d at 71. Thus, the plaintiff had not satisfied the threshold requirement of alleging an illegal agreement between *two or more* persons. The court found that this factor served to distinguish this case from *Rackin v. University of Pennsylvania*, 386 F.Supp. 992 (E.D. Pa. 1974), which the plaintiff herein relies upon.

In *Rackin, supra*, a female professor charged that the University of Pennsylvania, various officers and certain tenured members of the University's English Department discriminated against her in the terms and conditions of her employment, especially in the circumstances surrounding her application for tenure, on the basis of her sex, in violation of § 1985(3). More specifically, Professor Rackin alleged that she was discriminated against by the English Department's tenure committee in denying her tenure, the College of Arts and Sciences' tenure committee in granting her tenure in a department other than that in which it was earned contrary to clear University policy, and the faculty committee assigning teaching assignments in forcing her to teach freshmen undergraduate courses over her objection and in refusing to allow her to teach at the graduate level in the area of her scholarly specialization in spite of her success at doing so in the past.

The consideration which apparently impelled the court to reach the decision it did was not the number of alleged instances of discrimination, but the fact that these were not the acts of a single entity. *Girard, supra*. A university is "an institution of higher learning, consisting of an assemblage of colleges united under one corporate organization." *Black's Law Dictionary*, p. 1704 (4th ed. 1968). Although corporate in form a university bears little resemblance to the modern business corporation in the structure of its decision-making process or the degree of autonomy accorded to its component parts. Each of the various colleges and their component academic departments in a university structure function in an autonomous manner in that each determines its own policies regarding necessary qualifications for the award of tenure, the apportionment of teaching duties among various faculty members, and the terms and conditions of employment.

In the case at bar, plaintiff has alleged that the Company and a number of its employees discriminated against him from the time that he was hired until the time of his discharge. By necessity and function the structure of policy formulation and implementation at AT&T is radically different from that at a university. Policy is formulated by the board of directors and is implemented by corporate officers. The various departments of AT&T are not the functional equivalents of the colleges or academic departments of a university in that they are not accorded that autonomy or responsibility which is accorded the latter. Thus, the number of acts alleged by plaintiff is not the determinative factor, as the Company's structure is such that the Company and its agents function as a single entity. *Girard, supra*.

Plaintiff attempts to bootstrap his vague allegations of conspiracy by apparently seeking to invoke the doctrine of "piercing the corporate veil" in this context as an additional ground upon which to impose liability upon the individual defendants. The application of this doctrine in the the context of a 42 U.S.C. § 1985(3) action has its genesis in the statement in *Dombrowski v. Dowling* that "[w]e do not suggest that an agent's action within the scope of his authority will always avoid a conspiracy finding. Agents of the Klan certainly could not carry out acts of violence with impunity simply because they were acting under orders from the Grand Dragon." 459 F.2d at 196. Although nuclear as to its ramifications, this statement has been interpreted to authorize "piercing the corporate veil" to impose conspiratorial liability upon individuals who create a sham principal in order to avoid such liability. *Cole v. University of Hartford*, 391 F.Supp. 888 (D. Conn. 1975). "In other words, conspirators may not create a principal for whom they are agents in order to make their acts all the acts of a single legal person that cannot be charged with conspiring with itself." 391 Fed. Supp. at 893. Obviously, AT&T has not been created for such a purpose.

As the cases indicate, the criteria of conspiracy are not satisfied since "[s]imply joining corporate officers as defendants in their individual capacities is not enough to make them persons separate from the corporation in legal contemplation." *Cole, supra* at 893. The appellant has not alleged that the individual defendants acted other than in the course of their corporate duties nor that they were actuated by any independent personal stake in the outcome of the alleged illegal conduct, therefore, the dismissal of this claim should be sustained.

III F. Plaintiff is required to exhaust his administrative remedies as a prerequisite to maintaining a 42 U.S.C. § 2000e suit.

Plaintiff asserted in his complaint that defendant has discriminated against him on the basis of his race. Among other things, plaintiff alleged that defendant's actions violated Title VII (42 U.S.C. § 2000e et seq.) of the Civil Rights Act of 1964, as amended. He sought to invoke the plenary powers of the federal courts to enforce the provisions of this statute without having first resorted to the administrative remedies provided therein. In explanation of this crucial defect, plaintiff asserted that he could avoid the requirement of exhaustion of administrative remedies as a condition precedent to instituting suit in the federal courts as such remedies were inadequate and futile and there was good reason to justify nonexhaustion. The district court, however, disagreed and dismissed the claim for plaintiff's failure to exhaust his administrative remedies.

Plaintiff has appealed this dismissal and has reasserted his contention that a plaintiff is not required to exhaust his administrative remedies if those remedies are futile, inadequate or a justifiable reason exists for nonexhaustion. Plaintiff relies upon four cases, *State Corporation Commission v. Wichita Gas Co.*, 290 U.S. 561, 54 S.Ct. 321 (1934); *Kelly v. Board of Education of Nashville*, 159 F.Supp. 272 (M.D. Tenn. 1958); *Farley v. Turner*, 281 F.2d 131 (4th Cir. 1960); *Hupart v. Board of Higher Education of New York*, 420 F.Supp. 1087 (S.D.N.Y. 1976), to support his position. These cases, however, lend no credence to his position.

State Corporation Commission, supra, insofar as is relevant here, held that certain gas companies were not required to institute suit in state court as a condition pre-

cedent to challenging the constitutionality of an order of a state rate-setting commission in federal court. It is difficult to perceive the applicability of this case to that at bar, as it was decided twenty-six years before the enactment of Title VII, does not apply any civil rights legislation, and deals with a resort to state judicial remedies, whereas the present action involves federal administrative remedies. Even if this case bears some relevancy to the case at bar it provides no support to plaintiff's cause in that plaintiff herein has not challenged the constitutionality of any order or statute, and therefore is not entitled to avoid the exhaustion requirement under the rationale of the *State Corporation Commission* case.

In *Kelly, supra*, the Court was presented with a school desegregation case involving a state pupil placement statute administered by state bodies. The Court held that black students need not pursue a state administrative remedy before a local Board of Education as that body had consistently committed itself to a policy of continuing compulsory segregation. This is another pre-Title VII decision which deals with a state-created, as opposed to a federal, remedy in a factual context having nothing to do with employment discrimination. Even if this case were applicable to the present controversy, the plaintiff has failed to properly invoke its support by failing to allege that the agencies involved are committed to continuing racial discrimination in employment opportunities.

Hupart, supra, insofar as is relevant here, held that a plaintiff need not exhaust state administrative remedies prior to commencing suit under 42 U.S.C. § 1983 where the scope of relief available under the state scheme is not adequate to provide that which the complaint seeks, or where the administrative relief available is not final. This

decision is also inapplicable to the case at bar in that the court was dealing with a resort to state administrative remedies in the context of a suit brought under the Civil Rights Act of 1871. It is to be noted that Congress did not provide the comprehensive scheme of administrative relief for enforcement of §1983 that it did for Title VII. For that reason, cases dealing with the requirement of exhaustion of administrative remedies prior to commencing an action under § 1983 are inappropriate to a Title VII action. *Shudtz v. Dean Witter & Co.*, 418 F.Supp. 14, 17 (S.D.N.Y. 1976). Under the latter, the Congressional mandate that a claimant resort to these remedies prior to instituting suit is clear. No such intent is evident as to the former. Indeed, the Supreme Court has held that the remedies provided under Title VII are "separate, distinct and independent" of provisions of the civil rights acts. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461, 95 S.Ct. 1716, 1721 (1975). *C.f. Smith v. Perkin-Elmer Corp.*, 373 F.Supp. 930, 933-34 (D. Conn. 1973)."

In *Farley*, *supra*, the court held that black students seeking assignment to a particular school as well as an injunction restraining the maintenance of a system of compulsory segregated schools need not exhaust state administrative remedies provided by the Virginia Pupil Placement Act prior to instituting suit in the federal courts. The remedies in this case were administered by the State Pupil Placement Board. The court's holding was predicated upon findings of fact that the State Board maintained a consistent policy of denying assignment applications of any

9. It should be noted that in § 1983 suits, the Second Circuit has not abandoned the general rule of *Eisen v. Eastman*, 421 F.2d 560 (2d Cir. 1969), *cert. denied* 400 U.S. 841, 91 S.Ct. 82 (1970), requiring exhaustion of administrative remedies in most cases. *Cordova v. Reed*, 521 F.2d 621, 624 (2d Cir. 1975). See *Fuentes v. Roher*, 519 F.2d 379, 386-87 (2d Cir. 1975); *Plano v. Baker*, 504 F.2d 595, 597 (2d Cir. 1974).

child for enrollment in a school predominantly attended by members of another race, and of forcing a protest and hearing in every case. In addition, the court found that in placing more than 450,000 pupils in public schools, the Board had never placed a black child in a white school.

This case has no relevance to that at bar. Not only does it predate the enactment of Title VII, but also it considers an area, school desegregation, which is wholly distinct from the considerations underlying federal policy on equal employment opportunities. In *Farley, supra*, the court was dealing with intransigent state officials who were resisting the mandate of *Brown v. Board of Education of Topeka, Kansas*, 349 U.S. 294, 75 S.Ct. 753 (1955), which forbade compulsory segregation in the schools, under the guise of ameliorative state procedures set up to stave off federal intervention. In the case at bar, the very procedures plaintiff seeks to avoid are administered by the federal government as part of a comprehensive Congressional scheme to eliminate discriminatory employment practices. In this context, it would be ludicrous to accuse federal officials of continuing the very policies of discrimination which they are charged by law to eradicate, and the plaintiff has not done so.

Of paramount significance, however, is the fact that plaintiff's assertions that he may avoid any resort to Title VII administrative procedures in certain circumstances, are contrary to clear and unqualified declarations in recent Supreme Court decisions that resort to those procedures is a prerequisite to commencement of a suit under §§2000e *et seq.* in the federal courts. See, e.g. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47, 94 S.Ct. 1011, 1019 (1974); *Love v. Pullman Co.*, 404 U.S. 522, 523,

92 S.Ct. 616, 617 (1972); *Weise v. Syracuse University*, 522 F.2d 397, 412 (2d Cir. 1975).

The plaintiff concedes that he has failed to resort to any of these administrative procedures prior to instituting this suit. Rather, he claims that he may completely bypass these avenues of potential relief where such remedies are futile, inadequate or there is good reason to justify non-exhaustion. Although he fails to specify upon which of these three grounds he is resting his argument, plaintiff offers an unidentified report of the General Accounting Office to Congress concerning the effectiveness of the EEOC as an excuse for non-exhaustion. This report allegedly states that the EEOC has had little effect upon discrimination, has a waiting period of from two to seven years to resolve a complaint, that women and minorities "... continue to be concentrated on the bottom" and that as of 1974 AT&T was in widespread noncompliance with a Consent Decree entered into with the United States Government (Appellant's Brief p. 16). Upon this basis, he asserts that he may ignore the Congressional mandate, avoid administrative proceedings and sue directly in federal court. This position is untenable in view of the fact that the Supreme Court itself was aware of the delays which attended EEOC procedures when it mandated exhaustion of federal administrative remedies as a prerequisite to suit. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 465, n. 11, 95 S. Ct. 1716, 1722 n. 11 (1975). Indeed, Congress itself was not unmindful of the deficiencies of Title VII administrative procedures when it amended this section in 1972. H.R. Report No. 92-238, 92d Cong., 2d Sess. 2, 7 (1972), U.S. Code Cong. and Ad. News, 2139, 2144. See *Smith v. Perkin-Elmer Corp.*, 373 F. Supp. 930, 934 (D. Conn. 1973). However, the Congressional mandate as expressed in the statute and interpreted by

the courts was not altered. The only conclusion which can be drawn from this inaction, especially in light of the fact that the 1972 amendment to Title VII actually strengthened the enforcement capabilities of the Equal Employment Opportunity Commission, *See* P.L. 92-261, and 4 (March 24, 1972), 84 Stat. 104, 42 U.S.C. §2000 e-5(e), is that Congress intended to continue the requirement of exhaustion of administrative remedies as a condition precedent to maintaining a Title VII suit. 2A C. Dallas Sand, *Sutherland Statutory Construction* §22.33 (and cases cited therein) (Rev. 3rd ed. 1973). As plaintiff seeks to substitute his judgment for that of Congress as to the proper procedure to be followed for the vindication of statutory rights, the dismissal of this claim should be sustained.

III G. The dismissal of plaintiff's claims under New York Executive Law Sections 292.1, 296.1 and 297.9 was a proper exercise of the district court's discretion.

Plaintiff, in his amended complaint, has alleged that defendant's actions were illegal under New York Executive Law §§ 292.1, 296.1 and 297.9, and cites as error the district court's dismissal of this claim. Judge Duffy, in his Order, stated that the claim based on alleged violation of the above-cited New York Executive Law is not enforceable in federal court since such statutes are a part of an administrative scheme which is administered by the State Division of Human Rights with judicial review in state courts.¹⁰

Plaintiff filed his complaint in federal court pursuant to federal question jurisdiction under 28 U.S.C. § 1331.

10. The court also dismissed plaintiff's alleged causes of action based upon alleged violations of New York City Administrative Order B1-7.0. Plaintiff has withdrawn his appeal from the dismissal of such claim.

He appended to his various federal causes a number of state common law and statutory causes of action presumably pursuant to the doctrine of pendent jurisdiction. The district court, however, dismissed that state statutory cause of action which alleged a violation of Article 15 of the New York Executive Law (entitled therein and hereinafter referred to as the "Human Rights Law" or the "Law") for the reason that that claim which constituted part of the state administrative scheme enforceable by state agencies should properly be enforced in a state, not a federal court. But even assuming, *arguendo*, there is power in the federal courts to hear alleged violations of the New York Law, "[t]hat power need not be exercised in every case in which it is found to exist." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139 (1966).

The Supreme Court has recognized the discretionary nature of the doctrine of pendent jurisdiction. In the *United Mine Workers* decision the Court stated:

It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. (footnotes and citations omitted) 383 U.S. at 726, 86 S.Ct. at 1139.

In a footnote, the Court quoting Judge Magruder's concurrence in *Strachman v. Palmer*, 177 F.2d 427, 431 (1st Cir. 1949) asserted that "[f]ederal courts should not be overeager to hold onto the determination of issues that

might be more appropriately left to settlement in state court litigation." 383 U.S. at 726, n. 15, 86 S.Ct. at 1139, n. 15. Thus the Court in *United Mine Workers*, *supra*, established the principle that the grant or denial of pendent jurisdiction falls within the sound discretion of a trial court. In the case *sub judice*, the district court, in its sound discretion and in accordance with the principles espoused in *United Mine Workers*, *supra*, declined jurisdiction of a claim grounded upon a state statute.

Courts have not hesitated to exercise the discretionary aspects of pendent jurisdiction asserted in *United Mine Workers*, *supra*, and in numerous cases have declined to resolve state law issues. In *Phillips v. Carborundum Co.*, 361 F.Supp. 1016 (W.D.N.Y. 1973), the court held it would not exercise pendent jurisdiction with respect to a state claim under a state equal pay statute in view of the differences between the actions under state and federal law. The court, in *Hattell v. Public Service Co.*, 350 F.Supp. 240 (D. Colo. 1972) refused to adjudicate a pendent claim that would have caused a needless decision by it of state law issues. In *Rakes v. Coleman*, 181 F.Supp. (E.D. Va. 1970), the court stated that when the determination of a state law claim would require factual as well as legal investigation not otherwise necessary, pendent jurisdiction should not be exercised. Pendent jurisdiction was declined in *Catalano v. Department of Hospitals of New York*, 299 F.Supp. 166 (S.D.N.Y. 1969), which presented a question of the state's legislative intent, as the court reasoned that this question fell more appropriately within the ambit of the state court's expertise. As the above-cited cases indicate, declinations of pendent jurisdiction are generally based on the requirements of judicial economy, convenience to litigants and others involved, and the court's familiarity with and ability to interpret state laws. These

reasons support the dismissal of this state claim by the district court herein. Thus the dismissal was reasonable and falls within the discretion afforded a court under the doctrine of pendent jurisdiction.

Discretionary actions of a district court will not be disturbed on appeal unless such discretion is exercised in an abusive, unreasonable, arbitrary or capricious manner. *Delno v. Market St. Ry. Co.*, 124 F.2d 965 (9th Cir. 1942). See, e.g., *National Ben. Life Ins. Co. v. Shaw-Walker Co.*, 111 F.2d 497 (D.C. Cir. 1940), *cert. denied* 311 U.S. 673, 61 S.Ct. 35 (1940). Plaintiff states that the district court was in error as a matter of law with respect to its failure to exercise pendent jurisdiction over the alleged violations of the New York Human Rights Law. (Appellant's Brief, p. 23.) If the district court erred as a matter of law in failing to exercise jurisdiction over the state statutory claim, such would indeed constitute an abuse of discretion. *Beck v. Wings Field, Inc.*, 122 F.2d 114 (3rd Cir. 1941). However, since as a matter of law the district court was not required to hear any state law claims, plaintiff's assertion is without merit. *United Mine Workers, supra*. Furthermore, even if plaintiff were to allege additional reasons to justify a finding of abuse of discretion, which he does not, he would be hard-pressed to support such allegation, as the decision to extend jurisdiction to a state cause of action manifestly resides with the district court and the restrictive standard, "abuse of discretion," only justifies reversal of those actions which are arbitrary or capricious. The decision of the district court is not only reasonable but also in accord with the rationale of numerous cases, and therefore should be sustained.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the Order of the district court should be affirmed.

Respectfully submitted,

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July 1977

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PHILLIP DOUGLAS MILLER, Esq.

Petitioner,

v.

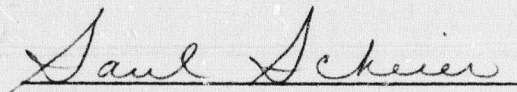
THE AMERICAN TELEPHONE AND TELEGRAPH
COMPANY, ("AT&T"), JOHN deBUTTS,
ROBERT FLINT, DONALD LAMONT, CYRUS
HALPERN, RODERICK AYA, MESSRS.
CHRISTENSON, ANDERSON, WORTHY, GAMMON
and CERTAIN OTHER UNNAMED EMPLOYEES
OF AT&T,

Respondents.

No. 77-7096

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies
of the "Brief of Appellee" have been served upon Appellant
Phillip Douglas Miller, Esq., Suite 1A, 434 East 52 Street,
New York, New York 10022, by hand delivery this 15th day
of July, 1977.


Saul Scheier

DATED: July 15, 1977

SAUL SCHEIER AND
VIRGINIA E. DAVIS, ESQS.

IN THE

United States Court of Appeals
for the 2nd Circuit
DOCKET No. 77-7096

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PHILLIP DOUGLAS MILLER, ESQ.,
Plaintiff,

VS

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,
Defendants

STATE OF NEW JERSEY)
 :SS.
COUNTY OF MIDDLESEX)

PROOF OF SERVICE

I, RONALD D. ANZIVINO, of full age, being duly sworn according to law upon my oath, depose and say:

1. I am the President of New Jersey Appellate Printing Co., Inc., a New Jersey corporation, the principal place of business of which is located at 177 Ryan Street, South Plainfield, New Jersey
77

2. On the 15th day of July 1977, I placed in the Post Office at South Plainfield, New Jersey, a package containing

two (2) copies Brief for American Telephone and Telegraph Company
plus the original Certificate of Service and a cover letter

first class mail, addressed:

Phillip Douglas Miller, Esq., 434 E. 52nd Street, Suite 1A, New York,
New York 10022

Sworn and subscribed to
before me this 15th day
of July 1977

IVY M. DARROS

IVY M. DARROS

Notary Public of New Jersey

My Commission Expires May 12, 1981

Ronald D. Anzivino
RONALD D. ANZIVINO

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Miller v. AT&T
77-7096



AT&T

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August 25, 1977

Mr. A. Daniel Fusaro, Clerk
United States Court of Appeals
for the Second Circuit
Room 1702
United States Court House
Foley Square
New York, New York 10007

Dear Mr. Fusaro:

In reviewing Appellee, AT&T's Brief, I have discovered two typographical errors, which I believe should be called to the Court's attention. On page 28 of the Brief, line 13, the word nuclear should be unclear and on page 30, line 5, the word dos should be does.

Very truly yours,

Virginia E. Davis

Virginia E. Davis

cc: Phillip Douglas Miller, Esq.

THIS COPY FOR

